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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, ex rel., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma,

PETITIONERS,

-vs-

APEX CONSTRUCTION COMPANY, INC., a corporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TO THE HONORABLE, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Sac and Fox Tribe of Indians of Oklahoma, and the United States of America ex rel. G. William Rice on behalf of the

Sac and Fox Tribe of Indians of Oklahoma, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on March 11, 1985, said Court having entered its order denying rehearing of the above-entitled case on May 9, 1985.

A. QUESTIONS PRESENTED FOR REVIEW.

1. Does 25 U.S.C. §81 (The Indian Contracting Statute) apply to an architectural and engineering contract made with a federally recognized Indian Tribe when the purpose of that contract is to provide contract services to the Tribe in order to obtain federal funding for, and to plan and supervise the construction of, a building located upon Tribal trust land, and, if so, does a complaint alleging a violation of 25

U.S.C. §81 by the Architect/Engineer state a claim upon which relief may be granted?

2. Does 25 U.S.C. §81 (The Indian Contracting Statute) apply to a construction contract made with a federally recognized Indian Tribe when the purpose of that contract is to provide contract services to the tribe in order to obtain federal funding for, and to construct a building upon Tribal trust land, and, if so, does a complaint alleging a violation of 25 U.S.C. §81 by the construction contractor state a claim upon which relief may be granted?

B. PARTIES TO THE ACTION.

The caption of the case in this Court contains the names of all parties to this action, except Western Construction Company of Oklahoma, Inc., a corporation. Default judgment was rendered in the District Court against Western Construction Company of Oklahoma, Inc. and no appeal from that judgment was taken.

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D. DECISIONS BELOW.

1. The decision in this action of the United States District Court for the Western District of Oklahoma is unreported. The order of that Court dismissing Petitioners' claims is reprinted in Appendix B, pp. 4 - 14.

2. The decision of the United States Circuit Court of Appeals for the Tenth Circuit sought to be reviewed is reported at 757 F.2d 221 (10th Cir., 1985) and the modification of said opinion upon rehearing is as yet unreported. The Tenth Circuit Decision is unofficially reported at 12 Indian Law Rptr. 2072 (1985). The Tenth Circuit's Opinion and the modification thereof upon Petition for Rehearing is reprinted in Appendix A, pp. 1 - 10.

E. JURISDICTION.

1. The judgment and opinion of the Tenth Circuit Court of Appeals sought to be reviewed (Appendix A, pp. 1 - 10) was entered on March 11, 1985, by the Honorable Judge Seymour of the Tenth Circuit.

2. A timely petition for rehearing was denied on May 9, 1985, (Appendix C, pp. 1).

3. The jurisdiction of the Supreme Court of the United States is invoked pursuant to Section 1254(1) of Title 28 of the United States Code and Section 1651 of Title 28 of the United States Code.

F. STATUTORY PROVISIONS INVOLVED.

This case involves Section 81 of Title 25 of the United States Code (Revised Statutes §2103 as amended by the Act of August 27, 1958, P.L. 85-770, 72 Stat. 927) which provides as follows:

§81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was paid.

G. STATEMENT OF THE CASE.

In July of 1977, the Sac and Fox Tribe of Indians of Oklahoma entered into a contract with Respondent Briesch Engineering Company, Inc., (hereinafter referred to as "Briesch") in which the Tribe agreed to pay Briesch approximately $30,700.00 for professional engineering services necessary to design and supervise the construction of a building upon lands held in trust for the Sac and Fox Tribe by the United States. In November, 1977, the Sac and Fox Tribe of Indians of Oklahoma entered into a contract with Respondent Apex Construction Company, Inc. (hereinafter referred to as "Apex") in which the Tribe agreed to pay approximately $305,791.90 for services from Apex necessary to construct a building upon lands held in trust for the Sac and Fox Tribe by the United States. Respondent Oklahoma Surety Company (hereinafter referred to as

"Surety") gave a surety bond in the amount of $305,791.90 to indemnify and hold harmless the Sac and Fox Tribe from all costs and damage by reason of any default, claim, or damage under the contract. Apex assigned or subcontracted the construction work under its contract to Western Construction Company of Oklahoma, Inc.

At the time of entering into their respective contracts, both Briesch and Apex were aware that the building to be constructed through their services would be constructed upon land held in trust by the United States for the Sac and Fox Tribe of Indians of Oklahoma, and that federal grant monies awarded to the Tribe pursuant to the laws of the United States would be used to pay for their respective services. The approval of those contracts by the Secretary of the Interior was not obtained, and

the respective contracts did not comply with 25 U.S.C. §81 in several additional respects.

The building was constructed and completed in late December 1978 or early January 1979 upon lands held in trust by the United States for the Sac and Fox Tribe of Indians of Oklahoma, and Briesch and Apex were paid for their services with funds received from a grant awarded to the Tribe by the Economic Development Administration, United States Department of

Commerce. Upon encountering severe construction defects in this building[1] and after obtaining no satisfaction from its contractors or surety, the Petitioners commenced this action in the United States District Court for the Western District of Oklahoma on May 11, 1982. In this action,

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1. Petitioners' complaint alleged actual damages of $181,574.00, or approximately two-thirds of the construction cost of the building, due to breaches by the engineer and contractor resulting in (a) the exterior walls of the building not being properly sealed and water-proofed thereby allowing rainwater to enter the building, (b) improper roof construction allowing rainwater to enter the building and causing significant danger of roof collapse without major roof replacement or repairs, (c) animals and rainwater entering the building through a space left between the roof and the wall, which space causes significant heat and cooling losses, (d) the central portion of the roof is improperly constructed and sealed resulting in the roof blistering, splitting, and leaking, (e) improper installation of the air conditioning duct system resulting in damage to the ceiling and failure of the duct system, (f) Apex failed to sumit proper payroll reports required by the Economic Development Administration thereby placing the Tribe's grant funds in jeopardy and causing excessive administrative costs to the Tribe.

the Petitioners alleged that the contracts with Briesch and Apex were null and void pursuant to 25 U.S.C. §81 thereby entitling Petitioners to recover the monies expended as provided in that statute, and brought alternative pendent claims for breach of the engineering and construction contracts (Appendix D).

Petitioners alleged that the United States District Court for the Western District of Oklahoma had jurisdiction to determine Petitioners' 25 U.S.C. §81 claims pursuant to 28 U.S.C. §§1331, 1345, 1355, and 1362. By order filed November 23, 1982 (Appendix B, pp. 1 - 3), the District Court, the Honorable Lee R. West, District Judge, held that the Court had "jurisdiction to determine whether 25 U.S.C. § 81 is applicable to the contract in question." On January 10, 1983, the District Court entered its order (Appendix B, pp. 4 - 14)

dismissing this action for failure to state a claim after determining that 25 U.S.C. §81 applies only to contracts involving expenditures of tribal funds and not to contracts for engineering and construction services to be paid for by grant monies due to the Sac and Fox Tribe from the United States Department of Commerce, Economic Development Administration, under the laws of the United States, and that the contracted services to construct a building upon Tribal land was not "relative to their lands."[2]

The Court determined that the purpose of 25 U.S.C. §81 was to "protect Indian people from dissipating their lands through agreements for imaginary services costing exorbitant amounts." Quoting the last

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2. Petitioners' Motion to Alter or Amend the Judgment of Dismissal was also denied (Appendix B, pp. 15 - 17).

paragraph of the statute nullifying contracts made in violation thereof and providing for recovery of monies expended by anyone on behalf of the Tribe under such void contracts, the District Court stated, "Given the severity of this penalty, 25 U.S.C. §81 must be used as a shield, not as a sword" and found that Petitioners had not stated a claim under the statute upon which relief can be granted.

On appeal, the Tenth Circuit affirmed finding that it was unnecessary to determine whether Section 81 of Title 25 of the United States Code applied to these contracts. Defining "tribal funds" as "those funds which already belong to a tribe through the sale of tribal resources or which constitute installment payments due the tribe under a treaty with the United States" the Tenth Circuit determined that contracts expending federal grant monies

were not subject to the statute's provisions and that Petitioners had failed to state a claim under that section. On Petition for Rehearing, the Tenth Circuit rejected Petitioners' additional arguments that these contracts were for services relative to the Tribal lands and thus within the scope of the statute irrespective of the source of the funds through which payment was made.

It is in this posture then, that Petitioners apply for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

H. REASONS FOR GRANTING THE WRIT.

Article I, Section 8, Clause 3, of the Constitution of the United States, grants Congress the exclusive power to regulate commerce "with the Indian Tribes" and this power has been repeatedly described as

plenary. **National Farmer's Union Ins. Co. v. Crow Tribe of Indians** 53 U.S.L.W. 4649 (No. 84-320, June 3, 1985); **Montana v. Blackfeet Tribe of Indians** 53 U.S.L.W. 4625 (No. 83-2161, June 3, 1985); **County of Oneida v. Oneida Indian Nation** __ U.S. __, 84 L.Ed.2d 169, 179 (1985)[3]; **Lone Wolf v. Hitchcock** 187 U.S. 553, 47 L.Ed 299 (1902); **Worcester v. Georgia**, 31 U.S.(6 Pet) 515, 561, 8 L.Ed 483 (1832)[4].

In its Constitutional sense, commerce includes not only traditional commercial

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3. "With the adoption of the Constitution, Indian relations became the exclusive province of federal law."

4. Madison cited the National government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation in urging the adoption of the commerce clause and the investiture of the Congress with exclusive authority to regulate such Trade. **The Federalist** No. 42, p. 284 (J. Cook, ed. 1961). See **County of Oneida**, supra at note 4.

dealings, but also intercourse and traffic between the citizens of the United States and the Tribes, the transportation of persons and property for that purpose, as well as the traditional purchase, sale, and exchange of goods, commodities, and services.[5] Congress, in 25 U.S.C. §81, has seen fit to regulate contracts with Indian Tribes which are for services:

"relative to their lands",

or for services relative to:

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5. **United States v. Holliday** 70 U.S. 407, 18 L.Ed 182 (1866); **Gibbons v. Ogden** 9 Wheat 1, 6 L.Ed 23 (1824); **Addyston Pipe & Steel Co. v. United States** 175 U.S. 211, 44 L.Ed 136 (1899); **Kidd v. Pearson** 128 U.S. 1, 32 L.Ed 346 (1888); **New York Life Ins. Co. v. Deer Lodge County** 231 U.S. 495, 58 L.Ed 332 (1913); **Hammer v. Dagenhart** 247 U.S. 251, 62 L.Ed 1101 (1917); **Hopkins v. United States** 171 U.S. 578, 43 L.Ed 290 (1898); **Blumenstock Bros. Adv. Agency v. Curtis Pub. Co.** 252 U.S. 436, 64 L.Ed 649 (1919); **United States v. South Eastern Underwriters Assoc.** 332 U.S. 533, 88 L.Ed 1440 (1912); **Philadelphia v. New Jersey** 437 U.S. 617, 57 L.Ed.2d 475 (1978).

> "any claims growing out of, or in reference to, annuities, installments, or other monies, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States",

providing strict minimal requirements for such contracts, and severe penalties for failure to comply with those requirements.

The issues squarely presented by this case are (1) what is the meaning of the two above quoted portions of 25 U.S.C. §81, and (2) does the enforcement provision in the last paragraph of the statute allow the recovery of money paid under contracts governed by the statute in the absence of compliance therewith. It is critically important that this Honorable Court address and resolve these issues at this time since the Eighth and Tenth Circuits, and the Seventh and Ninth Circuits have recently rendered decisions in conflict on the meaning of this statute. The Tenth Circuit decision

approving the decision of the United States District Court for the Western District of Oklahoma eviscerates the plain language of this statute, thereby putting Indian Tribes and the federal resources appropriated for their benefit in deadly peril, and the decision of the Tenth Circuit Court of Appeals is in direct conflict with **Green v. Menominee Tribe** 233 U.S. 558, 58 L.Ed 1093 (1914). If **Green v. Menominee Tribe**, Id., does not settle these issues, they should be settled by this Court in order to eliminate the dichotomy caused by the incompatible decisions of the Eighth and Tenth, and the Seventh and Ninth Circuit Courts of Appeal resulting in uncertainty as to the application of the statute, and hesitation on the part of non-Indian investor-businesspersons at a time when the Congress and the President have called for and encouraged private sector economic

development within the Indian Country of the Tribes. Simply stated, no one will invest their money or perform services for Indian Tribes within the Indian Country when they are unsure whether their contracts are valid, and therefore the policies of the Congress, the President, and the Indian Tribes will be frustrated. These issues should be resolved by this Court so that Indian Tribes can move forward to develop strong viable economies within the Indian Country subject to their jurisdiction.

A. Circuits in Conflict.

In **Wisconsin Winnebago Business Committee v. Koberstein** 762 F.2d 613 (7th Cir. 1985), the Seventh Circuit was called upon to determine the application of 25 U.S.C. §81 to a bingo management agreement which involved the construction of a building upon Tribal land. The Seventh Circuit

stated that the contract was null and void under 25 U.S.C. §81 when the defendants were:

> "to recieve $27,000 for preparing a proposal to be presented to the federal Department of Housing and Urban Development for federal funds and for supervising the construction of the [Bingo] hall. Ho-Chunk [the defendants] also was engaged under the terms of the contract for a five-year period 'commencing the first day of operation of the Bingo Hall, to assist the [Business Committee] in obtaining financing, construct, improve, develope [sic], manage, operate and maintain the Property as a facility for the conduct of bingo games . . . .'"

and the contract had not been approved by the Secretary of the Interior as required by the statute. **Wisconsin Winnebago Business Committee v. Koberstein**, supra.

Further, in **United States v. Southern Pacific Tranportation Company** 543 F.2d 676 (9th Cir., 1976), the Ninth Circuit Court of Appeals,[6] stated in response to the argument that an agreement between the Tribe and the railroads predecessor in interest constituted a revocable license to construct and use a railroad across Tribal land:

> We disagree with the district court and hold that a license may not be inferred from the 1880 and 1882 agreements and attendant circumstances. A license may not be inferred as an implied-in-fact contract because of the failure of Southern Pacific to comply with 25 U.S.C. §§81 & 84, which govern contracts with Indian tribes.

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6. The initial holding of the Court was that an agreement between the railroad's predecessor in interest and the Tribe did not convey a valid easement in Tribal land by virtue of 25 U.S.C. §177 and the failure of the railroad's predecessor to comply with statutory procedures for obtaining a valid right-of-way easement.

Thus the Seventh and Ninth Circuits have held that 25 U.S.C. §81 applies to contracts for the construction of improvements upon Indian Tribal lands, while the Tenth Circuit has held the statute inapplicable to such contracts[7]. This state of affairs will result in tribal and federal administrators, construction and engineering contractors, and others not being able to determine whether Secretarial approval is a necessary prerequisite for contract validity. For instance, the same construction contract that is valid within the jurisdiction of the Muskogee, Anadarko, and Albuquerque Area Offices of the Bureau of Indian Affairs (10th Circuit) and the

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7. In **Brown v. United States**, 486 F.2d 658 (8th Cir. 1973) the Eighth Circuit stated that 25 U.S.C. §81 was inapplicable to attorney contracts with Indian tribes when the attorney was not paid from tribal funds.

Aberdeen Area Office (8th Circuit) without Bureau approval is void in the Sacremento, Portland, and Juneau Area Office jurisdictions (9th Circuit). The Phoenix, Navajo, and Billings Area Office jurisdictions all lie partly within the 9th Circuit and partly within the 10th Circuit so that the same contract will be valid for some Tribes and void for others within the same Area Office. In the Minneapolis Area Office (6th, 7th, and 8th Circuits), the contract is void for the Tribes lying within the Seventh Circuit's area and apparently valid for the Tribes within the Eighth Circuit's area. The Eastern Area Office (1st, 2nd, 4th, 5th, and 11th Circuits) Bureau of Indian Affairs apparently has no recent determinative ruling upon the statute by its Circuits. The Writ of Certiorari should issue in order to resolve this conflict, and achieve uniformity of

decision regarding this federal Indian statute which directly impacts federal policy and important Bureau of Indian Affairs administrative procedures designed to promote Indian self-government and economic development.[8]

B. This Court's Supervisory Power Should Be Exercised Because of Departure From The Established Rules Of Statutory Construction.

The rules of construction involved in Indian cases are not new. As recently noted by this Court, the canons of construction applicable in Indian law are

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8. The cases of this Honorable Court have repeatedly emphasized recognition of the Congressional commitment to tribal self-government and self-determination. See, **National Farmer's Union Ins. Co. v. Crow Tribe of Indians**, 53 U.S.L.W. 4649 (No. 84-320, June 3, 1985) and cases cited therein at footnote 20.

deeply rooted in the unique trust relationship between the United States and the Indian Tribes, a relationship which has existed since the founding days of the Republic. **Montana v. Blackfeet Tribe of Indians** __ U.S. __, 53 U.S.L.W. 4625 (No. 83-2161, June 3, 1985); **County of Oneida v. Oneida Indian Nation** __ U.S. __, 84 L.Ed.2d 169 (1985).

A fundamental canon of construction in Indian cases is that statutes are to be construed liberally in favor of the

Indians, with ambiguous provisions interpreted to their benefit. **Montana v. Blackfeet Tribe of Indians** __ U.S. __, 53 U.S.L.W. 4625 (No. 83-2161, June 3, 1985); **County of Oneida v. Oneida Indian Nation** __ U.S. __, 84 L.Ed.2d 169 (1985)[9]. Further, the ordinary or established meanings of the words of the statute should prevail as the Indians would understand them, **McClanahan**, supra; **NLRB v. Amax Coal Co.** 453 U.S. 322, 330, 69 L.Ed.2d 246, 252 (1981), every word Congress used should be given effect, if

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9. **Northern Cheyenne Tribe v. Hollowbreast** 425 U.S. 649, 48 L.Ed.2d 294 (1976); **DeCoteau v. District Court** 420 U.S. 425, 43 L.Ed.2d 300, 314 (1975); **McClanahan v. Arizona Tax Commission** 411 U.S. 164, 36 L.Ed.2d 129 (1973); **Alaska Pacific Fisheries v. United States** 248 U.S. 78, 63 L.Ed. 138 (1916); **Choate v. Trapp** 224 U.S. 665, 56 L.Ed 941 (1912); **United States v. Celestine** 215 U.S. 278, 54 L.Ed 195 (1905); **Santa Clara Pueblo v. Martinez** 436 U.S. 49, 56 L.Ed.2d 106 (1978); **Merrion v. Jicarilla Apache Tribe** 455 U.S. 130, 71 L.Ed.2d 21 (1982).

possible, **United States v. Menasche** 348 U.S. 528, 99 L.Ed 615 (1955); **Reiter v. Sonotone Corp.** 442 U.S. 330, 60 L.Ed.2d 931 (1979), and equitable exceptions cannot be grafted onto the statute by the Courts when Congress forbore to make such an exception, **Louisville and N.R. Co. v. Mottley** 219 U.S. 467, 55 L.Ed 297 (1911).

The United States District Court for the Western District of Oklahoma in its order dismissing this action for failure to state a claim, and the United States Circuit Court of Appeals for the Tenth Circuit in its opinion affirming that order, ignored these definitive rules of statutory

construction, and construed this expansively worded statute in an extremely narrow fashion. In so doing, the lower Courts resolved all possible ambiguities against your Petitioners[10], eviscerated the plain language of the statute by limiting its effect to cases where tribal land would be

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10. The legislative history of this Act, March 3, 1871, Ch. 120, 16 Stat. 136, indicates that Congress understood construction contracts to be within its scope. See, 11 Cong. Globe 768 (1870-71)(remarks of Mr. Beck); 11 Cong. Globe 1811 (1871)-(remarks of Mr. Beck). Section 1 of the Act is now 25 U.S.C. §81 and applied to all agreements with Tribes relative to their lands or to claims connected with or due from the United States. Section 3 of the Act applied to certain classes of contracts made by federal agents for the expenditure of federal money appropriated to assist Indians by those federal agents. One of the explicitly named classes of contracts was contracts for "any buildings or machinery erected or placed on their reservations." Clearly Congress thought building contracts related to reservation land. See also, Investigation of Indian Frauds, H. Rept. No. 98, 42nd Cong., 3d Sess., March 3, 1873.

"dissipated" -- a situation more than adequately addressed by 25 U.S.C. §177, **County of Oneida v. Oneida Indian Nation** __

U.S. __, 84 L.Ed.2d 169 (1985) -- or where Tribal monies were involved[11], and completely eliminated the entire penalty provision of the statute which specifically provides

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11. The statute itself, 25 U.S.C. §81, broadly defines the second category of contracts subject to its terms as contracts for services relative to "any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States", a category far broader than tribal funds obtained from the sale of tribal resources or obtained through annuities. This Court, in **Hobbs v. McLean** 117 U.S. 567, 29 L.Ed 940 (1886) stated the definition of the term "claim" as used in the 1800's, "What is a claim against the United States is well understood. It is a right to demand money from the United States." Nowhere does the statute purport to regulate contracts to be paid by Tribal money already in the hands of the Tribe or obtained from the United States without the assistance of the contractor, unless such contract relates to tribal land, or to claims against the United States. The source of the funds used to pay such contracts is irrelevant since the statute says "for the payment or delivery of any money . . ." without limitation (emphasis added).

for a private right of action to recover all money received in violation of the statute.

These decisions by the lower Courts are so far outside the acceptable rules of statutory construction applicable in Indian cases, and so far in derogation of the unique federal trust responsibility for Indian tribes that this Court should exercise its supervisory authority and decide these issues according to the appropriate rules of statutory construction.

C. The Decision of the Tenth Circuit Court of Appeals Is In Direct Conflict With Applicable Decisions Of This Court.

In **Green v. Menominee Tribe** 233 U.S. 558, 58 L.Ed 1093 (1914), this Court was called upon to determine whether a petition for breach of contract, filed by a licensed

Indian trader, alleging an unwritten unapproved contract -- and thus in violation of 25 U.S.C. §81 -- with the Tribe for the purchase of equipment and supplies necessary to carry on a logging operation on Tribal land, said supplies and equipment to be paid for from the proceeds of that logging operation, stated a cause of action. In holding that no cause of action was stated, this Court opined:

> Again, we think that the conclusion of the court [holding that no cause of action was stated] on this subject is so clearly within the text of the statute that it suffices to direct attention to such text without going further. But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute, and so exemplifies the wrong which it was intended to remedy as to dispel any doubt otherwise engendered.

Further in **Pueblo of Santa Rosa v. Fall** 273 U.S. 315, 71 L.Ed 658 (1927), this

Court directly held that 25 U.S.C. §81 was applicable to a contract relative to Indian lands even though apparently no Tribal money changed hands. In this case, authority was purportedly granted to establish, by suit, the rights of the Pueblo to ownership of certain lands, and an undivided one-half interest in those lands was purportedly conveyed with the authority. This Court held both the authority and the conveyance void by virtue of 25 U.S.C. §§81 and 177, respectively.

Clearly if no claim can be stated upon an alleged contract in violation of 25 U.S.C. §81 relative to Indian lands (**Santa Rosa**) or to monies in the hands of federal agents (**Green**), a claim is stated by alleging payment under a contract violative of 25 U.S.C. §81.

I. CONCLUSION.

This Statute, 25 U.S.C. §81, is clearly written in the disjunctive, and the terms "relative to their lands" or, "claims" must be given their separate meanings. **Hancock v. Train** 426 U.S. 167, 48 L.Ed.2d 555 (1976); **FCC v. Pacifica Foundation** 438 U.S. 726, 57 L.Ed.2d 1073 (1978); **Reiter v. Sonotone Corp.** 442 U.S. 330, 60 L.Ed.2d 931 (1979).

It is beyond cavil that the opinions below have failed to apply the correct canons of construction to this statute. The division of the Circuit Courts of Appeal in their interpretation of the scope of this statute will have a serious negative effect upon the ability of Indian Tribes to increase their self-sufficiency and economic development as policies of the Congress and the President encourage, and the Bureau of Indian Affairs will have

an intolerable burden in determining what contracts in which areas and with what approval pursuant to this statute must be secured to ensure validity. These decisions are also inconsistent with the letter and spirit of the treatment given to this statute by the prior decisions of this Court.

Finally, Congress, in this statute, has granted a specific remedy for recovery of monies paid pursuant to agreements made in violation of the statutory provisions -- a remedy which the decisions of the Tenth Circuit and Western District of Oklahoma have held to be unavailable when the need arose. Petitioners do not assert that 25 U.S.C. §81 is applicable to every contract that could be made with an Indian tribe. However, this statute, apparently intended to eliminate the need for the Tribe to prove breach of contract in order to

recover in cases within its reach, does apply to two distinct classes of contracts for personal services "relative to their lands" and "[relative] to claims" against the United States for money. Petitioners have alleged in their complaint that the contracts at issue in this action fall squarely within both classes of cases to which the statute is applicable, and therefore, the decision of the Tenth Circuit Court of Appeals is erroneous. Due to the important federal and Indian issues presented by this action, this Court should exercise its discretion to review the judgment of the Tenth Circuit.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully Submitted,

ATTORNEYS FOR PETITIONERS

G. William Rice

F. Browning Pipestem *
PIPESTEM & RICE
Suite 100
408 W. Main
Norman, Oklahoma 73069
(405) 329-3840

* Counsel of Record

AFFIDAVIT OF SERVICE AND MAILING

Cleveland County }
} ss.
State of Oklahoma }

F. BROWNING PIPESTEM, being first duly sworn deposes and says:

1. That he is an active member of the Bar of this Court, and that he is an attorney for the Petitioners.

2. That the Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals to which this certificate is attached has been served upon all counsel of record for the parties in this cause in accordance with the provisions of Rule 28 of the Rules of the Supreme Court of the United States by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed to each of:

Mr. John B. Hayes
Looney, Nichols, Johnson, and Hayes

P.O. Box 468
Oklahoma City, Oklahoma 73101
Attorney for Apex Construction Company, Inc., and Oklahoma Surety Company

and

Mr. Gregory L. Mahaffey
Ms. J. Jayne Jarnigan
Mahaffey, Gore, and Brickell
420 West Main, #400
Oklahoma City, Oklahoma 73102
Attorney for Breisch Engineering Company, Inc.

3. That the foregoing represents service on parties required to be served under the provisions of Rule 28 of this Court.

4. That to my own personal knowledge and pursuant to Rule 28.2 of the Rules of this Court, forty copies of this Petition for a Writ of Certiorari were mailed, first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States on the _____ day of August,

1985, which is within the time allowed for filing this Petition under the Rules of this Court.

_____
F. Browning Pipestem

Subscribed and sworn to before me this _____ day of August, 1985.

[Seal]

_____
Notary Public

My Commission Expires: _____

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAC AND FOX TRIBE, et. al.,	)	
	)	
Appellants,	)	
	)	
v.	)	**No. 83-1374**
	)	
APEX CONSTRUCTION CO., INC. et. al.,	)	**Filed Mar 11 1985**
	)	
	)	
Appellees.	)	

OPINION

SEYMOUR, Circuit Judge.

Plaintiffs appeal from the dismissal of their complaint for failure to state a claim under 25 U.S.C. §81 (1982). We affirm the judgment of the district court.

In 1977, the Sac and Fox Indian Tribe of Oklahoma won a grant from the Economic Development Administration (EDA) of the Department of Commerce for the purpose of building a museum and cultural center upon land held in trust for the tribe by the

United States. The tribe employed defendant Briesch Engineering to design the center and awarded the construction contract to defendant Apex Construction as the low bidder.[1] The contract price was over $300,000.00 to be paid from the EDA grant monies. The center was completed and both defendants were paid in full.

Several years later, the tribe encountered severe defects in the buildings, apparently due to faulty design and/or construction. Plaintiffs filed this action alleging that the contracts were void under 25 U.S.C. §81 for failure to obtain the approval of the Secretary of the Interior. They sought recovery of all monies paid by

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1. The third defendant, Oklahoma Surety, executed performance bond with Apex as principal, naming the tribe as obligee.

the tribe under the contracts. Alternatively, they claimed that defendants had breached their respective contracts and sought damages.

Section 81 provides in pertinent part:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United states, for the payment or delivery of any money or other thin of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of it, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United states, unless such contract or agreement be executed and approved as follows:
>
> . . . .
>
> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.
>
> . . . .
>
> All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on account of such

services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

The district court held that the purpose of this statute is "to protect Indian people from dissipating their lands through agreements for imaginary services costing exorbitant [sic] amounts. That situation does not exist in the case before this Court." Rec., vol. I, at 270. The court also stated that it was "not convinced that the contracts at issue provide services for Indians 'relative to their lands.'" Id. at 272. Finally, the court concluded that the statute applies only to tribal funds and not to grant monies received from the EDA. He therefore granted defendants' motion to dismiss.

We need not decide whether the district court was correct in holding that section 81 does not govern the type of contract present here because we agree that the statute does not apply to the EDA grant monies that were expended. As the Eighth Circuit recognized in **Brown v. United States**, 486 F2d 658 (8th Cir. 1973), the statute governs only "the right to be compensated from tribal funds." **Id**. at 661 n.2. The EDA grant monies were awarded for the specific purpose of building a museum and cultural center. The tribe then solicited bids and awarded the construction contract to the lowest bidder. Presumably, the grant included certain procedural requirements designed to prevent improper use of the funds. We can see no reason to require approval from the Secretary of the Interior for the expenditure of funds

approved and released by another governmental department. The statute is designed to protect the funds of the tribe, not grant monies of the United States expended for the benefit of the tribe.

The Supreme Court recognized the distinction between tribal funds and public monies of the United States in **Quick Bear v. Leupp**, 210U.S. 50 (1908). There, the Court upheld the expenditures of tribal funds which belonged to the Indians themselves to support sectarian schools, but acknowledged that gratuitous appropriations of public monies raised by taxation could not be similarly spent. As the Court noted: "One class of appropriations relates to public moneys belonging to the Government; the other to moneys which belong to the Indians and which is administered for them by the Government." **Id**. at 77. See also, **Scholder v. United States**

428 F.2d 1123, 1129 (9th Cir.)(use of public monies appropriated for Indian irrigation system to build an irrigation lateral on non-Indian land was not an unconstitutional taking of funds held in trust for Indians.) cert. den. 400 U.S. 942 (1970).

Tribal funds are principally raised through the sale of tribal resources or through treaty payments by the United states for land cessions or other dispositions of tribal property. Although these funds belong to the tribe, they are held in trust by the United states and are administered by the Department of the Interior. See generally, F. Cohen, **Handbook of Federal Indian Law**, ch. 9 §D (1982). The statute specifically refers to "any claims growing out of . . . annuities, installments, or other money . . . under laws or treaties with the United States . . . or

due from the United States." This language embraces those funds which already belong to a tribe through the sale of tribal resources or which constitute installment payment due the tribe under a treaty with the United States. See also, **Quick Bear**, 210 U.S. 50. Approval by the Secretary for the release of these funds protects tribal property from ill-advised dissipation. Conversely, public grant monies released by an alternative federal source require no such approval or protection. See Cohen, supra, ch.13 §G.

In conclusion, we agree that section 81 governs only those contracts involving the expenditure of tribal funds. Consequently, plaintiffs have not stated a claim under that section. The tribe must pursue its remedies for breach of the contracts in the appropriate state forum. Cf. **Gila River Indian Community v. Henningson, Durham &**

Richardson, 626 F.2d 708, 714-15 (9th Cir. 1980), cert. den.,451 U.S. 911 (1981).

The judgment of the district court is affirmed.

Upon the denial of Petitioners' Petition for Rehearing, the Court substituted the following in place of the last paragraph of the foregoing opinion.

In conclusion, we agree that section 81 governs only those contracts involving the expenditure of tribal funds. Consequently, plaintiffs have not stated a claim under that section. The tribe must pursue its remedies for breach of the contracts in the appropriate forum. Cf. **Gila River Indian Community v. Henningson, Durham & Richardson**, 626 F.2d 708, 714-15 (9th Cir. 1980), cert. den.,451 U.S. 911 (1981).

The judgment of the district court is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, and THE UNITED STATES OF AMERICA ex rel. G. WILLIAM RICE, on behalf of the Sac and Fox Tribe of Indians of Oklahoma	)	
Plaintiffs,	)	
vs.	)	CIV-82-672-W
APEX CONSTRUCTION COMPANY, INC., a coporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; WESTERN CONSTRUCTION COMPANY OF OKLAHOMA, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,	)	Filed Nov 23 1982
Defendants.	)	

ORDER

In this case the parties have briefed the issued of subject matter jurisdiction upon the suggestion at pretrial that there is no federal question.

Plaintiff has alleged in Counts I and III that the contract between the parties is null and void under 25 U.S.C. §81 et. seq. The Court finds that it has jurisdiction to determine whether 25 U.S.C. §81 is applicable to the contract in question.

The parties have briefed the applicablility of 25 U.S.C. §81, et. seq. to the contract in question. Since form should prevail over substance, the question is more properly whether Plaintiffs have stated a claim under 25 U.S.C. § 81. Accordingly, the Court will treat the briefs as a Motion to Dismiss for Failure to State a Claim, allow both parties ten (10) days from this date to submit supplemental authorities and set the matter for hearing on the Motion to Dismiss for Failure to State a Claim and the Motion to

Dismiss the Counterclaim on the 22nd day of Dec, 1982, at 8:30, a.m.

IT IS SO ORDERED this 23rd day of November, 1982.

/s/Lee R West
LEE. R. WEST
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, and THE UNITED STATES OF AMERICA ex rel. G. WILLIAM RICE, on behalf of the Sac and Fox Tribe of Indians of Oklahoma	)	
Plaintiffs,	)	
vs.	)	**CIV-82-672-W**
APEX CONSTRUCTION COMPANY, INC., a coporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; WESTERN CONSTRUCTION COMPANY OF OKLAHOMA, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,	)	**Filed Jan 10 1983**
Defendants.	)	

ORDER

On about November 30, 1977, defendant Apex Construction company, Inc., made an agreement with the Sac and Fox Tribe of Indians of Oklahoma whereby the Sac and Fox Tribe agreed to the prospective payment and delivery of $305,791.90 in consideration of defendant Apex Construction Company, Inc. providing services necessary to build a

Museum/Cultural Center Complex upon lands held in trust by the United States for the use and benefit of the Sac and Fox Tribe. The construction services to be performed were to be paid for by grant monies due to the Sac and Fox Tribe from the United States Department of Commerce, Economic Development Administration, under the laws of the United States.

In Count I of their Complaint the plaintiffs complain that this agreement is null and void and contrary to law in that it violates Section 81 of Title 25 of the United States Code. Plaintiffs also complain that the Oklahoma Surety Company made and furnished to plaintiff Sac and Fox tribe a surety performance bond to guarantee payment of damages, costs, or claims arising from the defendant Apex Construction Company, Inc.'s activities under said agreement. Plaintiffs demand that a

judgment be entered according to statute in the amount of $311,527.04 against Apex Construction Company, Inc., and the Oklahoma Surety Company.

In Count II plaintiffs complain as a second or alternative claim for relief against defendants Apex Construction Company, Inc., and Oklahoma Surety Company that said building was not constructed in accordance with plans and specifications or in a good and workmanlike manner and as a result plaintiffs were damaged in the sum of $181,574.00.

On July 21, 1977, defendant Briesch Engineering Company, Inc., made an agreement with the Sac and Fox Tribe whereby the Sac and Fox Tribe agreed to the prospective payment and delivery of $30,700.00 in consideration of defendant Briesch Engineering Company, Inc., performing professional services as construction

engineer necessary to build the Museum/Cultural Center. The engineering services to be performed were to be paid for by grant monies due to the Sac and Fox Tribe from the United States Department of commerce, Economic Development Administration, under the laws of the United States.

In Count III the plaintiffs complain that this agreement is null and void and contrary to law in that it violates section 81 of Title 25 of the United States Code. Plaintiffs demand that judgment be entered in the amount of $30,700.00 against Briesch Engineering Company, Inc.

In Count IV plaintiffs complain as a fourth or alternative claim for relief against defendant Briesch Engineering Company, Inc., that Briesch failed to inspect the work of the contractor, failed to require contractor to perform the work according to the Contract Documents, and

failed to reject nonconforming work and require nonconforming work to be properly completed and as a result plaintiff was damaged in the sum of $181,574.00.

The parties briefed the issue of subject matter jurisdiction upon the suggestion at pretrial that there is no federal question. The Court found that it has jurisdiction to determine whether 25 U.S.C. §81 is applicable to the contract in question with the question being whether plaintiffs have stated a claim under 25 U.S.C. §81. Accordingly, the Court allowed both parties to submit supplemental authorities and is treating the briefs as a Motion to Dismiss for Failure to State a Claim.

25 U.S.C. § 81 states

> "No agreement shall be made . . . with any tribe . . . for the payment . . . of any money . . . in consideration of services for . . . Indians relative to their lands. . ."

To determine the intended scope of 25 U.S.C. § 81 the Court looks to the legislative history of the statute. In Handbook of Federal Indian Law by Felix S. Cohen (1942) at page 281 the author makes the following comment with respect to § 81:

> Some light is thrown upon the intended scope of the statute by the extensive report of the House Committee on Indian AFfairs on the frauds which the statute was designed to circumvent, and the expected consequences of the legislation. In general the legislation was directed against the "godless robbery of those defenseless people" by attorneys and claim-agents. Investigation of Indian Frauds, H. Rept. No. 98, 42nd Cong., 3d Sess., March 3, 1973 [sic].

The purpose, then, of § 81 is to protect Indian people from dissipating their lands through agreements for imaginary services costing exorbitant amounts. That situation does not exist in the case before this Court.

The Court in Brown v. United States, 486 F.2d 658, 661 (8th Cir. 1973), further limited the application of § 81. The Court said

> "Representation of a tribe by an attorney who does not have a contract with the Tribe that had been approved by the Secretary of the Interior is not prohibited by 25 U.S.C. § 81. We read the statute as only governing the right to be compensated from tribal funds".

In this case the money expended was not tribal funds but rather grant monies from the United States Department of Commerce, Economic Development Administration.

Section 81 also applies only to agreements for services for Indians "relative to their lands." The parties have cited several cases to clarify what services for Indians are "relative to their lands." Plaintiff relies upon United states v. Algoma Lumber Company, 305 U.S. 415 (1939), to show that 25 U.S.C. § 81 is applicable

to a contract to "fill, cut, remove, sell, or otherwise dispose of dead timber" upon Indian lands. However, the Court did not hold that § 81 was applicable; it held only that the United States was not a party to contracts for the sale to a lumber company of timber on unallotted land of an Indian reservation. Both parties cite United States v. Southern Pacific Transportation Company, 543 F.2d 676 (9th Cir. 1976), which merely held that where agreements between a railroad and Indians respecting railroad right-of-way through an Indian reservation were ineffective to grant right-of-way to the railroad, a license could not be inferred as an implied-in-fact contract because of failure of the railroad to comply with 25 U.S.C. §§ 81 and 84.

The parties agree that a contract with an Indian for the payment of money in consideration of services to be rendered to

the said Indian relative to lands of his tribe which he proposes to enter as allotments falls within 25 U.S.C. § 81. Smith and Steele v. Martin, 115 P. 866 (Okla. 1911). Both parties cite Green v. Menominee Tribe, 233 U.S. 588 (1914) but disagree as to the relevancy of the Supreme Court's decision to the issue in this case. In Green Indian traders furnished members of the Menominee tribe supplies. Green, one of the traders, sought to recover from the Menominee tribe and 158 of its named members for supplies furnished. The liability of the tribe was based upon averments that it had expressly guaranteed that individual members would pay. An amended petition was filed joining the United States as a defendant. The Supreme Court affirmed the decision of the Court of Claims that § 2103 of the Rev. Stat. (now 25 U.S.C. § 81) was "applicable and

controlling"; "the contract alleged was not in writing and did not in other respects conform to the statute" therefore "no right to recover was stated in the petition." The Supreme Court further stated, "But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is applicable, we are of the opinion that the case as made is so within the spirit of the statute and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered." Given the case law cited by the parties, this Court is not convinced that the contracts at issue provide services for Indians "relative to their lands."

25 U.S.C. § 81 provides as penalty for failure to comply with the statute that

> All contracts or agreements made in violation of this section shall be null and void, and all money or other

> thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

Given the severity of this penalty, 25 U.S.C. § 81 must be used as a shield, not as a sword.

For the above stated reasons, this Court finds that the plaintiffs have failed to state a claim under 25 U.S.C. § 81 upon which relief can be granted. Accordingly, the defendants' Motion to Dismiss should be and is hereby GRANTED.

IT IS SO ORDERED this 10th day of January, 1983.

/s/Lee R West
LEE R. WEST
United States
District Judge

Entered in Judgment
Docket on 1-10-83

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Oklahoma City, Oklahoma
Dated: February 23, 1983

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, and THE UNITED STATES OF AMERICA ex rel. G. WILLIAM RICE, on behalf of the Sac and Fox Tribe of Indians of Oklahoma	)	
Plaintiffs,	)	
vs.	)	**CIV-82-672-W**
APEX CONSTRUCTION COMPANY, INC., a coporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; WESTERN CONSTRUCTION COMPANY OF OKLAHOMA, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,	)	
Defendants.	)	

To Herbert T. Hope, Clerk:

Please enter the following minute order in the above entitled case.

This matter comes before the Court upon the plaintiffs' Motion to Alter or Amend the Judgment of Dismissal. Defendants Apex

Construction Company, Inc., Oklahoma Surety Company and Briesch Engineering Company, Inc. responded in opposition to the motion.

This Court, in its Order of January 10, 1983, found that the plaintiffs failed to state a claim under 25 U.S.C. §81 upon which relief can be granted; accordingly, the defendants' Motion to Dismiss was granted. Plaintiff raise two grounds to support their Motion to Alter or Amend: (a) Contracts to design or construct buildings to be placed upon lands are related to land and (b) Plaintiff's Complaint states a claim upon which relief may be granted. This Court considered these two issues in its Order of January 10, 1983, and upon consideration of the discussion of the plaintiffs in their Motion to Alter or Amend this Court finds that its Order of January 10, 1983, should stand.

Accordingly, the plaintiffs' Motion to Alter or Amend the Judgment of Dismissal should be and is hereby DENIED.

/s/Lee R West
UNITED STATES
DISTRICT JUDGE

Counsel Notified / /

Clerk to Notify / x /

APPENDIX C

MARCH TERM - May 9, 1985

Before Honorable Monroe G. McKay, Honorable Oliver Seth, and Honorable Stephanie K. Seymour, Circuit Judges

SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, et al,	)	
Plaintiffs-Appellants,	)	
vs.	)	**No. 83-1374**
APEX CONSTRUCTION CO., INC. et al.,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/Howard K Phillips
HOWARD K. PHILLIPS,
CLERK

United States Court of Appeals
Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

May 9, 1985

TO: ALL RECIPIENTS OF THE CAPTIONED OPINION

RE: No. 83-1374 The Sac and Fox Tribe of Indians, etc., et al v. Apex Construction Company, Inc., et al
Filed March 11, 1985, by Judge Seymour

Attached is a new page 6 which should be substituted for page 6 of the opinion in the captioned cause which was filed on March 11, 1985, by Judge Seymour.

Very truly yours,

/s/Howard K Phillips
HOWARD K. PHILLIPS
Clerk

HKP:oac
Enclosure

U.S. 50. Approval by the Secretary for the release of these funds protects tribal property from ill-advised dissipation. Conversely, public grant monies released by an alternative federal source require no such approval or protection. See Cohen, supra, ch. 13, § G.

In conclusion, we agree that section 81 governs only those contracts involving the expenditure of tribal funds. Consequently, plaintiffs have not stated a claim under that section. The tribe must pursue its remedies for breach of the contracts in the appropriate forum. Cf. **Gila River Indian Community v. Henningson, Durham & Richardson**, 626 F.2d 708, 714-15 (9th Cir. 1980), cert. den.,451 U.S. 911 (1981).

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARCH TERM - March 11, 1985

Before Honorable Monroe G. McKay, Honorable Oliver Seth and Honorable Stephanie K. Seymour, Circuit Judges.

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA and the UNITED STATES OF AMERICA ex rel. G. WILLIAM RICE on behalf of the SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA,	)	**JUDGMENT**
	)	**83-1374**
	)	**(D.C. # 82-672-W)**
Plaintiffs-Appellants,	)	
v.	)	
APEX CONSTRUCTION COMPANY, INC., a corporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,	)	
Defendants-Appellees,	)	
and WESTERN CONSTRUCTION COMPANY OF OKLAHOMA, a corporation,	)	
Defendant.	)	

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/Howard K Phillips
HOWARD K. PHILLIPS,
CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, and THE UNITED STATES OF AMERICA ex rel. G. WILLIAM RICE, on behalf of the Sac and Fox Tribe of Indians of Oklahoma	)	
Plaintiffs,	)	
vs.	)	CIV-82-672-W
APEX CONSTRUCTION COMPANY, INC., a coporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; WESTERN CONSTRUCTION COMPANY OF OKLAHOMA, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,	)	Filed May 11 1982
Defendants.	)	

COMPLAINT

Plaintiffs complain of Defendants and show the Court the following:

JURISDICTIONAL ALLEGATIONS

(1) This is an action arising under the provisions of Title 25 United States Code

Section 81 for damages, penalties, and forfeitures, for violation of the provisions of the aforementioned act, all as hereinafter more fully set forth.

(2) Jurisdiction is conferred on this Court by reason of Title 25 United States Code Section 81, and Title 28 United States Code Sections 1331, 1345, 1355, and 1362.

PARTIES

(4) The Plaintiff Sac and Fox Tribe of Indians of Oklahoma is a federally recognized Indian Tribe with a governing body duly recognized by the Secretary of the Interior occupying lands held in trust by the United States for said Tribe in Lincoln County, Oklahoma.

(5) Plaintiff United States of America brings this action on the relation of G. William Rice, an individual person resident of Cleveland County, Oklahoma, by authority

of Section 81 of Title 25 of the United States Code.

(6) Defendant Apex Construction Company, Inc. is a Corporation organized under the laws of the State of Oklahoma with said Corporation's principal offices being located in Cleveland County, Oklahoma, and is incorporated and licensed to do business in Oklahoma County, Oklahoma, and is or was doing business in Lincoln County, Oklahoma, at all pertinent times hereinafter mentioned.

(7) Defendant Briesch Engineering Company, Inc., is a Corporation organized under the laws of the State of Oklahoma with said Corporation's principal offices located in Tulsa County, Oklahoma, and is incorporated and licensed to do business in Oklahoma County, Oklahoma, and is or was doing business in Lincoln County, Oklahoma,

at all pertinent times hereinafter mentiond.

(8) Defendant Oklahoma Surety Company is a Corporation organized under the laws of the State of Oklahoma with said Corporations principle offices located in Tulsa County, Oklahoma, and is incorporated and licensed to do business in Oklahoma County, Oklahoma, and is or was doing business in Lincoln County, Oklahoma, as a surety bonding company at all perinent times hereinafter mentioned.

(9) Defendant Western Construction Company of Oklahoma, Inc., is a corporation organized under the laws of the State of Oklahoma and is incorporated and licensed to do business in Oklahoma County, Oklahoma, and is or was doing business in Lincoln County, Oklahoma, at all pertinent times hereinafter mentioned. On information and belief, Plaintiffs allege that the

principle offices of this corporation are located in Cleveland County, Oklahoma.

FIRST COUNT

Plaintiffs complain against defendants Apex Construction Company, Inc., Western Construction Company of Oklahoma, Inc., and Oklahoma Surety Company, and for a first claim for relief allege:

(10) On or about the 30th day of November, 1977, in Lincoln County, Oklahoma, Defendant Apex Construction Company, Inc., made an agreement with the Sac and Fox Tribe of Indians of Oklahoma whereby the Sac and Fox Tribe of Indians of Oklahoma agreed to the prospective payment and delivery of Three Hundred Five Thousand Seven Hundred Ninety-One and 90/100 Dollars ($305,791.90) in lawful money in consideration of Defendant Apex Construction Company, Inc. performing all building construction services necessary to build a

Museum/Cultural Center Complex upon the lands held in trust by the United States for the use and benefit of the Sac and Fox Tribe of Indians of Oklahoma located five (5) miles south of the town of Stroud, Lincoln County, Oklahoma.

(11) The construction services to be performed mentioned in Paragraph (10) above were, with the knowledge of Defendant Apex Construction Company, Inc., to be paid for by grant monies due to the Sac and Fox Tribe of Indians of Oklahoma from the United States Department of Commerce, Economic Development Administration, under the laws of the United States.

(12) The above referenced agreement is absolutely null and void and contrary to law in that it does not bear the approval of the Secretary of the Interior or the Commissioner of Indian Affairs or their

authorized successors or representatives endorsed upon it.

(13) The above referenced agreement is absolutely null and void and contrary to law in that it does not specifically contain the names, residence, and occupation of all the real parties in interest, and, in information and belief, Plaintiffs allege that said agreement was further assigned by Defendant Apex Construction Company, Inc., in violation of Section 84 of Title 25 of the United States Code to Western Construction Company of Oklahoma, Inc., an Oklahoma Corporation.

(14) The above referenced agreement is absolutely null and void and contrary to law in that it does not specifically contain the tribal authorities, the scope of such tribal authority, or the reason for exercising that tribal authority.

(15) The above referenced agreement is absolutely null and void and contrary to law in that it does not have a fixed limited time to run which is distinctly stated, nor does it state the place where made.

(16) The Sac and Fox Tribe of Indians of Oklahoma paid in lawful money beginning on the 10th day of January, 1978, the sum of Three Hundred Eleven Thousand Five Hundred Twenty-Seven and 04/100 Dollars ($311,527.04) to Defendant Apex Construction Company, Inc., and to others, including Western Construction Company of Oklahoma, Inc., and Oklahoma Surety Company, on behalf of, or through, Defendant Apex Construction Company, Inc.

(17) The Oklahoma Surety Company made and furnished to Plaintiff Sac and Fox Tribe of Indians of Oklahoma, a surety performance bond to guarantee payment of

damages, costs, or claims arising from defendant Apex Construction Company, Inc.'s, activities under said contract. A copy of said bond is attached hereto marked "Exhibit B" and made a part hereof.

(18) By virtue of Defendant's unlawful actions, Plaintiffs have been damaged in the total sum of Three Hundred Eleven Thousand Five Hundred Twenty-Seven and 04/100 Dollars ($311,527.04) for which judgment should be entered according to the statute.

SECOND COUNT

Plaintiffs complain against defendants Apex Construction Company, Inc., Western Construction Company of Oklahoma, Inc., and Oklahoma Surety Company, and for a second or alternative claim for relief allege:

(19) Plaintiffs incorporate Paragraphs (1) through eighteen (18) inclusive of this complaint against Defendants and make such

paragraphs a part hereof as if fully set out herein.

(20) That if federal jurisdiction is not otherwise conferred as to this count, that the Court should exercise its discretion so as to take pendant jurisdiction over the Plaintiff's second claim for relief in the interest of judicial economy so that all of Plaintiff's claims may be determined in one action.

(21) That on November 30, 1977, in the County of Lincoln, State of Oklahoma, plaintiff Sac and Fox Tribe of Indians of Oklahoma entered into an agreement in writing with defendant Apex Construction Company, Inc., a contractor for construction services necessary to complete a Museum/Cultural Center building on lands held by the United States in trust for the use and benefit of plaintiff Sac and Fox Tribe of Indians of Oklahoma in Lincoln

County, State of Oklahoma, in accordance with the conditions, drawing, and specifications attached to and made a part of said contract.

(22) Under said contract, said contractor was to furnish all the materials and perform all the work and services for the completion and construction of said building within 180 days of being notified to proceed, subject to delays in said contract provided for, and in consideration therefor, and in consideration therefor, plaintiff Sac and Fox Tribe of Indians of Oklahoma was to pay to said defendant, for said improvement, the aggregate price of Three Hundred Five Thousand Seven Hundred Ninety-One and 90/100 Dollars ($305,791.90).

(23) That Defendant Apex Construction Company, Inc., assigned or subcontracted the above mentioned contract to Western

Construction Company of Oklahoma, Inc., and that Defendant Western Construction Company of Oklahoma, Inc., performed work on such contract.

(24) Said contract further provided that said contractor was to make a bond to Plaintiff Tribe in the sum of $305,791.90, by and through an acceptable surety company, and that said contract should not become effective until such bond should be delivered to Plaintiff Tribe. A copy of said contract is hereto attached, marked "Exhibit A" and made a part hereof.

(25) That upon mutual execution of said contract, defendant contractor made and furnished to plaintiff, and the same was accepted by plaintiff, a bond with defendant Oklahoma Surety Company as surety and defendant Apex Construction Company, Inc., as principal, in accordance with said contract.

(26) The conditions of said bond were that defendant contractor should faithfully perform said contract, should satisfy all claims and demands incurred for the same, should faithfully indemnify and save harmless plantiff Tribe from all costs and damage which it might suffer by reason of failure so to do, and should fully reimburse and repay plaintiff all outlays and expenses which it might incur in making good any such default. A copy of said bond is attached hereto marked "Exhibit B" and made a part hereof.

(27) The general conditions attached to and made a part of said contruction contract contained an express provision that the contractor would in a good and workman-like manner do and perform all work and furnish all supplies and materials necessary or proper to perform and complete

all the work required by the contract, and the contract plans and specifications.

(28) That in truth and in fact, said building was not constructed in accordance with said plans and specifications or in a good and workman-like manner in the (a) the exterior walls of said building were not properly waterproofed thereby allowing rainwater to enter the building; (b) that the roof over the building is improperly constructed and improper materials used thereby allowing rainwater to enter the building and on information and belief plaintiffs allege that improper roof construction is causing a significant danger, that portions of this roof will collapse; (c) that the space between the roof and the north wall was not properly closed permitting animals and rainwater to enter the building thereby causing heat loss in winter and heat gain in the summer;

(d) that the flat portion of the roof in the central portion of the building is improperly constructed and sealed in such a manner that this portion of the roof has and will blister, split, and leak; (e) that portions of the air conditioning supply duct system are improperly supported resulting in sagging and failure of said duct system and damage to the ceiling of the building; (f) defendant Apex Construction Company, Inc., failed and refused to submit the payroll reports required to the Economic Development Administration thereby placing plaintiff Tribe's grant funds in jeopardy and causing excessive administrative costs to Plaintiff Tribe.

(29) That plaintiff has duly performed all the conditions of the aforesaid contract on his part, and the same were fully completed on February 16, 1979.

(30) That by reason of the failure of defendant contractor to comply with its part of said agreement, and by reason that plaintiff will be forced to move and store a large portion of its property now in said building during repairs, plaintiff has been damaged in the sum of One Hundred Eighty-One Thousand Five Hundred Seventy-four and no/100 Dollars ($181,574.00)

(31) That defendant's Apex Construction Company, Inc., Western Construction Company of Oklahoma, Inc., and Oklahoma Surety Company, though often requested, have failed and refused and still fail and refuse, to carry out said agreement and to construct said structure according to said agreement, or to indemnify and reimburse plaintiff according to their contract and bond aforesaid, to plaintiff Tribe's damage in the sum aforesaid.

THIRD COUNT

Plaintiffs complain against defendant Briesch Engineering Company, Inc., and for a third claim for relief allege:

(32) Plaintiffs incorporate Paragraphs one (1) through thirty-one (31) inclusive of their complaint against defendants and make such paragraphs a part hereof as is fully set out herein.

(33) On or about the 21st day of July, 1977, in Lincoln County, Oklahoma, defendant Briesch Engineering Company, Inc., made an agreement with the Sac and Fox Tribe of Indians of Oklahoma whereby the Sac and Fox Tribe of Indians of Oklahoma agreed to the prospective payment and delivery of Thirty Thousand Seven Hundred and No/100 Dollars ($30,700.00) in lawful money in consideration of Defendant Briesch Engineering Company, Inc.'s, performing professional services as construction

engineer necessary to build a Museum/-Cultural Center Complex upon the lands held in trust by the United States for the use and benefit of the Sac and Fox Tribe of Indians of Oklahoma located five (5) miles south of the town of Stroud, Lincoln County, Oklahoma.

(34) That the engineering services to be performed were, with the knowledge of Defendant Briesch Engineering Company, Inc., to be paid for by grant monies due to the Sac and Fox Tribe of Indians of Oklahoma from the United States Department of Commerce, Economic Development Administration under the laws of the United States.

(35) The above referenced agreement is absolutely null and void and contrary to law in that it does not bear the approval of the Secretary of the Interior or the Commissioner of Indian Affairs or their

authorized successors or representatives endorsed upon it.

(36) The above referenced agreement is absolutely null and void and contrary to law in that it does not specifically contain the names, residence, and occupation of the real parties in interest.

(37) The above referenced agreement is absolutely null and void and contrary to law in that it does not specifically contain the tribal authorities, the scope of such tribal authority, or the reason for exercising that tribal authority.

(38) The above referenced agreement is absolutely null and void and contrary to law in that it does not state the place where made, or have a fixed limited time to run which is distinctly stated.

(39) The Sac and Fox Tribe of Indians of Oklahoma paid in lawful money beginning on the 7th day of December, 1977, the sum of

Thirty Thousand Seven Hundred and No/100 Dollars ($30,700.00) to Defendant Briesch Engineering Company, Inc.

(40) By virtue of Defendant Briesch Engineering Company, Inc.'s, unlawful actions, Plaintiffs have been damaged in the total sum of Thirty Thousand Seven Hundred and No/100 Dollars ($30,700.00) for which judgment should be entered according to the statute.

FOURTH COUNT

Plaintiffs complain against defendant Briesch Engineering Company, Inc., and for a fourth or alternative claim for relief allege:

(41) Plaintiffs incorporate Paragraphs one (1) through forty (40) of their complaint against defendants and make such paragraphs a part hereof as if fully set out herein.

(42) That if federal jurisdiction is not otherwise conferred as to this count, that the Court should exercise its discretion so as to take pendant jurisdiction over the Plaintiff's fourth claim for relief in the interest of judicial economy so that all of Plaintiff's claims may be determined in one action.

(43) That on July 21, 1977, in the County of Lincoln, State of Oklahoma, Plaintiff Sac and Fox Tribe of Indians of Oklahoma entered into a contract in writing with Defendant Briesch Engineering Company, Inc., for engineering services to be performed by said defendant.

(44) That under the contract, said engineer was to inspect the work of the contractor, to insure that the building was constructed according to the design plans and specifications and to guard the Sac and Fox Tribe of Indians of Oklahoma against

defects and deficiencies in the work of the contractor and to disapprove or reject any work failing to conform to the contract documents.

(45) That defendant Briesch Engineering Company, Inc., wholly failed to perform its part of said agreement, failed to require contractor to perform the work according to the Contract Documents, and failed to reject nonconforming work and require nonconforming work to be properly completed.

(46) That plaintiff has duly performed all the conditions of the aforesaid contract on his part, and the same were fully completed on December 13, 1978.

(47) That by reason of the failure of defendant engineering company to comply with its part of said agreement, plaintiffs has been damaged in the sum of One Hundred

Eighty-One Thousand Five Hundred Seventy-Four and No/100 dollars ($181,574.00).

(48) That defendant Briesch Engineering Company, Inc., though often requested, has failed and refused, and still fails and refuses, to carry out said agreement or to indemnify and reimburse plaintiff for the damages suffered by its failure to inspect said building adequately to plaintiff's damage in the sum aforesaid.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs demand judgment against defendants Apex Construction Company, Inc., Western Construction Company of Oklahoma, Inc., and Oklahoma Surety Company in the amount of Three Hundred Thirty-Seven Thousand Three Hundred Thirty-Seven and 52/100 Dollars ($337,337.52), the costs of this action, and an attorney fee of One Hundred Fifty-five Thousand Seven

Hundred Sixty-Three and 52/100 Dollars ($155,763.52) as provided by the statute.

Plaintiffs demand judgment against defendant Briesch Engineering Company, Inc., in the amount of One Hundred Ninety-Six Thousand Nine Hundred Twenty-Four and No/100 Dollars ($196,924.00), the costs of this action, and an attorney fee of Fifteen Thousand Three Hundred Fifty and No/100 Dollars ($15,350.00) as provided by the statute.

/s/G William Rice

G. WILLIAM RICE, Esq.

Attorney for Plaintiffs

Supreme Court, U.S.
FILED
SEP 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-229

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, EX REL., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma,

Petitioners,

-vs-

APEX CONSTRUCTION COMPANY, INC., a corporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,

Respondents.

OPPOSING BRIEF OF RESPONDENTS, APEX CONSTRUCTION COMPANY, INC. and OKLAHOMA SURETY COMPANY, TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Attorney for Respondents,
Apex Construction Company, Inc.
and Oklahoma Surety Company

September, 1985

*Counsel of Record.

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Petitioners' presentation of the questions for review are satisfactory to these respondents.

THE PARTIES

Petitioners are the Sac and Fox Tribe of Indians and its attorney, G. William Rice, as an individual. For convenience and brevity, they will be referred to collectively as the 'Tribe". The respondents are Apex Construction Company, Inc. (hereafter Apex), Briesch Engineering Company, Inc. (hereafter Briesch), and Oklahoma Surety Company (Oklahoma Surety).

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In the
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THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, EX REL., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma,
Petitioners,

-VS-

APEX CONSTRUCTION COMPANY, INC., a corporation; BRIESCH ENGINEERING COMPANY, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,
Respondents.

OPPOSING BRIEF OF RESPONDENTS, APEX CONSTRUCTION COMPANY, INC. and OKLAHOMA SURETY COMPANY, TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

Although the Tribe's Statement of the Case fairly reflects the proceedings below, for the purpose of continuity and clarification Apex and Oklahoma Surety submit a brief chronological summary.

The Department of Commerce, Economic Development Administration (EDA) granted funds to the Tribe to finance the design and construction of a museum and cultural cen-

ter to be built on the Tribe's land held in trust by the United States. In accordance with EDA guidelines, the Tribe employed Briesch (an engineering firm) to design the building, and awarded the construction contract to Apex, the low bidder. EDA contract and bond forms were utilized. To comply with the contract, Apex, as principal, and Oklahoma Surety, as surety, executed a performance bond in favor of the Tribe, as obligee.

Approximately three and one-half years after the project was complete and the engineer and contractor were fully paid with grant funds, the Tribe and its attorney (as an individual) filed suit in the U. S. District Court for the Western District of Oklahoma seeking to have both contracts declared void, plus a money judgment for all the grant money paid them. As authority for both the court's jurisdiction and the merits of the claims, the Tribe relied upon 25 U.S.C. § 81, which specifies that certain contracts with Indian Tribes be approved by the Secretary of the Interior and the Commissioner of Indian Affairs.

Alternative actions alleging breaches of the engineering and construction contracts, as well as the performance bond, were asserted. The Tribe contended that the trial court had pendent jurisdiction to hear the contract actions, even if § 81 jurisdiction was lacking.

Apex, Briesch, and Oklahoma Surety questioned the trial court's jurisdiction, arguing that the contracts were not of the type which necessitated Interior approval and that, in any event, the funds paid them were granted by the government and were not tribal funds contemplated by § 81. The trial court treated the jurisdictional objections as

motions to dismiss for failure to state a claim, and dismissed the entire complaint via an unpublished order. The trial court opined that § 81 was not applicable (a) because grant funds, not tribal funds, were involved, and (b) because he was not convinced that the contracts fell within the purview of § 81 protection.

The U. S. Court of Appeals, Tenth Circuit, found it unnecessary to decide whether § 81 covered the type contracts involved, and affirmed on the singular basis that § 81 did not apply because grant or gift funds, as opposed to tribal funds, were involved. *The Sac and Fox Tribe of Indians, et al.* v. *Apex Construction Company, Inc.*, 757 F.2d 221 (10th Cir. 1985).

REASONS FOR NOT GRANTING THE WRIT.

Before considering the Tribe's specific arguments a brief review of § 81 and its history is in order. Section 81 provides in pertinent part:

> "No agreement shall be made by any person with any tribe . . . for the payment . . . of any money . . . in consideration of *services* for said Indians relative to their lands, or to any claims . . . [against the United States] . . . unless such contract . . . [is executed and approved in a specific manner]. (emphasis supplied).

Quite obviously the statute encompasses two types of "service" contracts — those "relative to [Indian] lands" and those "relative" to Indian claims against the United States.

The question arises: Does the statute cover all contracts which are even remotely "relative" to Indian lands, even though they don't require the payment of tribal funds,

or does it cover only "service" type contracts which are "relative to [Indian] lands" and call for the payment of tribal funds? The legislative history of § 81 appears to answer the question in favor of the latter interpretation.

The history of § 81 may be gleaned from House Committee on Indian Affairs, Investigation of Indian Frauds, H. R. Rep. No. 98, 42d Cong., 3d Sess. 3 (1873). Section 81 had its genesis in a March 3, 1871 Act of Congress (16 Stat. 544-571) which followed an extensive investigation into frauds in Indian matters — frauds against the government and against the tribes and Indians themselves. Section 3 of the 1871 Act (16 Stat. 570) contains almost identical language to the first paragraph of § 81. The second portion of Section 3 of the Act, like § 81, declares void contracts not properly approved, provides for suits to recover payments, and, in addition, subjects the person contracting with the tribe (as well as aiders and abettors) to a misdemeanor charge carrying a minimum fine of $1,000 and a minimum prison term of not less than six months.

H. R. Rep. No. 98 indicates that the Committee's investigation centered around "representative contracts" (p. 3) under which attorneys, agent, or middle-men undertook to represent the tribes and Indians in their claims against the government. In other words, "service" type contracts. The Committee did not concern itself with "public" contracts — where the government purchases supplies for the Indians under treaty stipulations or acts of Congress, presumably because § 1 of the 1871 Act (16 Stat. 568, an appropriations provision) directed the government to make no payments for goods, supplies, transportation, buildings, or machinery placed on reservations pursuant to contracts

with the Interior Department until the accounts and vouchers had been examined by a board of commissioners appointed by the President.

The concern, therefore, was with agents, attorneys, and middle-men who were obviously taking advantage of the Indians when contracting to secure allotments, collect funds owed by the government, and assert claims of a similar nature.

The Committee did not believe that § 3 of the 1871 Act went far enough because it did not regulate the manner of making private contracts with Indians and tribes, did not require that a copy of the contract be furnished to the government, did not direct the disposition of money collected under the service contracts, and did not regulate payment for partial performance. Thus, the Act of May 21, 1872, was formulated and enacted (17 Stat. 136). The substance of the 1872 Act is essentially the same as the 1871 Act and the present day version of § 81 with certain variations. The 1872 version required that copies of contracts be submitted, that they be executed before a judge of a court of record, and that they be approved in writing by the Secretary of Interior and the Commissioner of Indian Affairs. Also, other details were to be supplied — the type information the government might need to exercise its discretion in approving or disapproving. Section 3 of the 1872 Act specifies that "no money shall be paid to any agent or attorney by the government" under any *such* contract other than "the fee due him for services rendered thereunder." (17 Stat. 137). The contracting party was required to prepare and swear to a detailed claim to be submitted to the government for examination.

The Committee opined that the 1872 statute would serve to prevent the "godless robbery" of the Indians by attorneys and claim agents. The House Report treats in detail contracts between attorneys, claim agents, etc., and the Indians or tribes.

The inescapable conclusion is that § 81 was enacted to regulate attorney or claim agent "service" type contracts, not contracts under which the private sector constructs buildings on tribal property. There obviously existed in 1871 and 1872 a considerable number of Indian claims against the United States arising out of treaties and acts of Congress. The House Report suggests that the Indians really didn't need attorneys or claim agents since the establishment of a claim depended wholly upon the presentation of government records or acts of Congress.

Thereafter the Acts of 1871 and 1872 were revised into R.S. § 2103. Although the language was changed slightly, the substance remained and continues to be the same through the current codification into § 81, but for a 1958 amendment (Public Law 85-770, 72 Stat. 927) which deleted the requirement that such contracts be executed before a judge of a court of record. The revised statutes, as well as the more recent codification, rearranged some of the sections. For example, the requirement to submit a sworn claim to the government for approval is contained in § 82, as is the requirement that any funds collected on behalf of tribes and Indians be paid over to the United States. The criminal penalty for a violation of §§ 81 and 82 is now codified in 18 U.S.C. § 438.

F. Cohen, *Handbook of Federal Indian Law*, p. 281 (1942), states that the legislation was directed against the "godless robbery of those defenseless people" by attorneys and claim-agents. A reading of the House Report leads to that conclusion.

More recently, a Subcommittee of the Senate Committee on Interior and Insular Affairs submitted a partial report dealing with contracts between Indian tribes and attorneys: *Attorney Contracts with Indian Tribes,* S. Rep. No. 8, 83d Cong., 1 Sess., pp. 2-3 (1953). That report indicates that § 81 was intended to apply to contracts between attorneys and agents on the one part and the tribes and individual Indians on the other.

Moreover, Interior's only regulations under § 81 are marshalled under the heading "Attorney Contracts With Indian Tribes." See: 25 C.F.R. § 72 (1982). The Department of Interior's interpretation of an Indian statute is entitled to "great weight" in judicial construction. *United States* v. *Jackson*, 200 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361 (1930).

In summary, § 81 most definitely appears to have been directed toward the evils of unconscionable attorney or claim-agent contracts, not toward construction contracts funded with grant money. The vast majority of cases dealing with § 81 have involved agents, attorneys, or others who have contracted to represent tribes or Indians in asserting claims against the government or in managing their tribal property. For example, *United States* v. *Crawford,* 47 Fed. 561 (W.D. Ark. 1891) was concerned with a contract between the Creek Nation and "delegates" employed

to sell "Oklahoma" to the United States. In deciding the jurisdictional issue the court referred to § 81 as a statute controlling the payment of money to agents or attorneys. Similarly, *In re Sanborn*, 148 U.S. 222, 13 S.Ct. 577, 37 L.Ed. 429 (1893), refers to § 81 as governing "contracts between Indians and agents or attorneys for services. . . ." U.S. at p. 227, S.Ct. at p. 579, L.Ed. at p. 431.

With this brief summary of legislative history, the specific contentions of the Tribe may be answered more logically.

A. RESPONSE TO THE TRIBE'S CONTENTIONS THAT DECISIONS OF THE CIRCUIT COURTS ARE IN CONFLICT

Apex and Oklahoma Surety disagree with the Tribe's argument that the decisions of the Circuit Courts are conflicting.

The dismissed complaint of the Tribe alleges that it entered into a construction contract whereby Apex was to construct a building on tribal lands and be paid with funds granted by the EDA. Performance of the construction contract was bonded by Oklahoma Surety. Neither Apex nor Oklahoma Surety had anything to do with securing the EDA grant. Both the contract and the bond were on EDA forms.

The Tribe claims that the engineering and construction contracts are void for lack of § 81 approval, and that it (and its attorney) are entitled to recover all payments made thereunder. The purported liability of Oklahoma Surety is apparently based upon the Tribe's mistaken belief that the contract performance bond (covering an alleged void con-

tract) obligates the surety to refund the construction money (even though the bond was conditioned that Apex would "faithfully perform its duties" under the contract).

The trial judge determined that § 81 was inapplicable because grant funds, not tribal funds, were involved, and stated that he was not convinced that either contract was one to provide services for Indians "relative to their lands."

The Tenth Circuit affirmed for the singular reason that § 81 does not apply where government grant money is being spent. The court agreed with *Brown* v. *United States*, 486 F.2d 658 (8th Cir. 1973), which held that § 81 governs only "the right to be compensated with tribal funds." *Id.* at 661. *Brown* involved a contract with an attorney.

The Tribe argues that both the instant case and *Brown* conflict with *Wisconsin Winnebago Business Committee* v. *Koberstein*, 762 F.2d 613 (7th Cir. 1985) and *United States* v. *Southern Pacific Transportation Company*, 543 F.2d 676 (9th Cir. 1976). The *Winnebago* opinion was not published when the case at bar was decided. *Southern Pacific* was cited to the Tenth Circuit but was not referred to in the opinion.

The principal holding of *Southern Pacific* was that agreements between a railroad and Indians respecting a right-of-way through a reservation were ineffective under the 1899 General Railroad Right-of-Way Act. Preceding a discussion of whether a consensual license could have been created, the court summarily stated that a license could not be implied in fact because of the railroad's failure to comply with 25 U.S.C. §§ 81 and 84. The court then focused on 25 U.S.C. § 177, and held that implying a license would

"run counter to the historical policies underlying section 177." *Id.* at 697. In summary, *Southern Pacific* does not conclude that § 81 applies where grant money, as opposed to tribal funds, is involved. Thus, the decision does not conflict with the Tenth Circuit opinion. Instead, *Southern Pacific* concerns an ineffective attempt to convey an interest in land contrary to the provisions of § 177, and an agreement to transport Indians in exchange for a "license" in favor of a railroad "relative to [Indian] lands."

The facts of *Wisconsin Winnebago Business Committee* v. *Koberstein, et al.*, 762 F.2d 613 (7th Cir. 1985), differ substantially from those under consideration. The governing body of the Wisconsin Winnebago Tribe ("Tribe") hired Koberstein as its attorney, apparently without being advised of a potential conflict of interest. Koberstein recommended and the Tribe entered into a contract with Ho-Chunk Management Corporation (Ho-Chunk), whose president was Koberstein. Under the agreement Ho-Chunk was to receive $27,000.00 for preparing a HUD proposal to secure federal funds with which to construct a bingo hall on tribal property, and for supervising its construction. [The opinion does not say if the funds were loaned or granted.]. Moreover, Ho-Chunk was to manage the bingo hall for five years and have the exclusive right to "operate and maintain the Property" for bingo games in exchange for 25% of the net operating profit. The management agreement was submitted to the Bureau of Indian Affairs for approval. Instead of approving or disapproving, a Field Solicitor for the Department of Interior opined that the agreement did not need § 81 approval because the funds to be spent (revenue from bingo operations) were not derived from amounts

due to the Tribe from the United States, trust property, or the proceeds of trust property.

Without § 81 approval and without knowledge of the solicitor's opinion, Ho-Chunk ordered the commencement of construction. When the facility was completed Ho-Chunk began bingo operations even though the Tribe voted to rescind the agreement and enacted an ordinance requiring Ho-Chunk to secure a license. When Ho-Chunk refused to comply the Tribe filed suit alleging that the management agreement was void for want of § 81 approval.

The trial court (the opinion is unpublished) held that the funds to be paid Ho-Chunk — 25% of the net operating profits — were derived from trust property (the use of tribal lands and facilities as a bingo hall for revenue), and, therefore, § 81 approval was necessary. In the Seventh Circuit Ho-Chunk did not contend that the management contract was not "relative to [Indian] lands", but limited its argument to the Field Solicitor's concept that § 81 applies only where the funds being spent are due a Tribe from the United States, or constitute trust property or the proceeds of trust property. In addition, Ho-Chunk contended that the "relative to [Indian] lands" portion of § 81 had been impliedly repealed by the enactment of numerous more specific statutes regulating the disposition, leasing, and use of tribal land. The Seventh Circuit rejected both arguments.

Although the opinion does not by express language agree with the trial court's holding that the funds paid Ho-Chunk (bingo revenue) were derived from "trust" property, a very strong implication to that effect exists. The

Seventh Circuit conceded the existence of numerous more specific statutes governing tribal lands, but found none to justify a holding of repeal by implication. Instead, the court stated that *because* the management agreement gave Ho-Chunk the absolute right to control the bingo facility located on tribal land and prevented the tribe from encumbering the property, the agreement was one "relative to [Indian] lands" within the purview of § 81.

Unlike *Winnebago*, the case at bar does not involve the control and dissipation of tribal trust property, the proceeds of trust property, or revenue derived from trust property (whether held by the government in trust or by the Tribe itself). Nor do the agreements in question involve the control or management of tribal land. Instead, the money in this case was a gift by the EDA to be used for the very purpose for which it was actually expended — to design and construct a museum and cultural center.

It is submitted that the Tenth Circuit was correct in concluding that § 81 was designed to protect the funds of the Tribe, not to protect grant money of the United States which is being spent for the benefit of a tribe under the auspices of another arm of the government, particularly where the grant presumably includes EDA procedural requirements designed to prevent its improper use.

In summary, *Winnebago* does not conflict with the Tenth Circuit's opinion in this case, *Brown or Southern Pacific*. *Brown* and the instant case involved non-tribal funds, whereas *Winnebago* involved tribal funds — revenue derived from a bingo hall operated on trust property — plus the control of tribal property. Thus, the argument of con-

flicting decisions of the courts of appeal should not serve as a basis for granting certiorari.

The Tribe's conclusion that the Seventh and Ninth Circuits have held that § 81 applies to contracts for the construction of improvements on tribal lands, whereas the Tenth Circuit has held otherwise, is not justified. The *Winnebago* case involved either a HUD grant or loan to construct a bingo hall. The construction contract wasn't the issue (the opinion doesn't mention the contractor). At issue was the management agreement which gave Ho-Chunk the exclusive right to manage and control tribal property. *Cf.* Contracts for the Employment of Managers of Indian Enterprises, 61 Op. Solicitor, Dept. of Interior, No. M-36119 (Feb. 14, 1952), cited in *Winnebago,* which concludes that contracts to operate a tribal farming enterprise, the development of livestock industries to utilize crops raised by the enterprise, and the marketing of surplus crops is "relaive to [Indian] lands" as that term is used in § 81.

In summary, the case at bar involves an EDA grant to construct an improvement on tribal trust property — it does not involve money owed the Tribe by the government or the proceeds of trust property or funds derived from its use. Conversely, *Winnebago* involved the disposition of funds derived from the use of tribal lands, as well as its management and control. The decisions simply are not conflicting.

B. RESPONSE TO THE TRIBE'S ASSERTION THAT THE SUPREME COURT'S SUPERVISORY POWER SHOULD BE EXERCISED BECAUSE OF THE TENTH CIRCUIT'S ALLEGED DEPARTURE FROM ESTABLISHED STATUTORY CONSTRUCTION

Apex and Oklahoma Surety do not take issue with the authorities cited by the Tribe dealing with the rules under which Indian Statutes are to be construed, but do question the Tribe's conclusion that the Tenth Circuit's decision constitutes a severe departure from the plain meaning of § 81.

The legislative history, recited above, clearly indicates that the ill Congress sought to cure was unconscionable attorney and claim-agent agreements under which both tribes and individual Indians were being scalped. Congress obviously had "service" type contracts in mind, otherwise the word "service" would not have been used. There was no need to protect the Indians in the use of grant money in the manner directed by the donor (the United States).

Surely Congress had no intention of making every contract with Indians and tribes subject to § 81 approval. This would have prevented Indians and tribes from hiring farm help, getting a house or barn built, or entering into similar "work" type agreements without Interior approval. As was brought out in oral argument before the Tenth Circuit, such a broad interpretation would lead to absurd results, and would necessitate Interior approval before a leaky roof could be repaired, a sewerline unstopped, an air conditioner fixed, crops harvested, real property improvements insured, and perhaps even a lawn mowed.

The Tribe's petition for certiorari (footnote 10, p. 29) incorrectly suggests that all sections of the 1871 Act covered

contracts for "any building or machinery erected or placed on their reservations." It is true that the 1871 Act contains a section with similar language, but it is not the section which was subsequently codified as § 81. The first section of the 1871 Act, found at 16 Stat. 544 through a portion of 570, is an appropriation provision which directs that the government withhold payments to contractors for goods and supplies, the transportation thereof, and for buildings or machinery erected or placed on reservations *under contracts entered into with the Interior Department* (pursuant to the appropriation) beyond 50% of the amount due until the accounts and vouchers have been submitted to and approved by a board of commissioners appointed by the President. Section 3 of the 1871 Act (16 Stat. 570, now § 81) contains no such language. The provision of the 1871 Act to which the Tribe refers subsequently appears as § 2107 of the revised statutes, but does not appear in the codified statutes. That particular section was repealed in 1933 (47 Stat. 1428-29). Therefore, it can hardly be concluded that a directive contained in the appropriation section of the 1871 Act indicates that Congress intended to subject construction contracts entered into by a Tribe (as opposed to Interior) to § 81 approval.

Not only would the Tribe's interpretation of § 81 deprive Indians of substantial independence, it would constitute a severe departure from the apparent intent of Congress. Although the Tenth Circuit declined to decide whether the contracts with the Tribe came within the purview of § 81 and based its decision solely upon the source of the funds, it is respectfully suggested that when § 81 was enacted Congress had no intention whatsoever of ex-

erting such close control over Indians and thus preventing them from building real property improvements without Interior approval. Conversely, there is no question but that Congress intended to prevent attorneys and agents from cheating the Indians through unconscionable "service" or "representational" type contracts under which they agree to assert claims against the United States or control and manage tribal property.

In summary, although the Tenth Circuit declined to pass upon the issue, it seems clear that Congress had no intention of requiring § 81 approval of tribal construction contracts, particularly where they are being funded with grant money.

C. RESPONSE TO PETITIONERS' SUGGESTION THAT THE TENTH CIRCUIT'S DECISION IS IN DIRECT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The Tribe asserts that the Tenth Circuit's decision is in direct conflict with *Green* v. *Menominee Tribe*, 233 U.S. 558, 34 S.Ct. 706, 58 L.Ed. 1093 (1914). Although *Green* was cited to the Tenth Circuit, it is not discussed in the opinion, probably because the Tenth Circuit decided that § 81 was not applicable because tribal funds were not being spent. The facts in *Green* were that Indian traders had furnished members of the Menominee Tribe supplies necessary to cut or remove timber from an unallotted reservation. Green, one of the traders, sought to recover his charges from the Tribe and 158 of its members. Green asserted that the Tribe was liable because it had expressly guaranteed that the individuals would pay. The Court of Claims had jurisdiction under a special statute. That court held that an

action against the Tribe did not exist because the Statutes of Frauds barred the enforcement of a verbal guaranty.

An amended petition joined the United States as a defendant based upon an allegation that the Commissioner of Indian Affairs had employed an agent to represent the Tribe in its dealings concerning timber removal and the procurement of necessary supplies. The Court of Claims concluded that the special Act in question granted no right to sue the United States and conferred no jurisdiction over the individual Indians aside from their membership in the Tribe. In determining the procedural issue (whether a cause of action was stated), the Court of Claims further held that the relevant provisions of § 81 (then § 2103 of the revised statutes) applied, and that the contract was not enforceable because it was oral instead of in writing.

This Court affirmed, stating that the agent (not the plaintiff trader) had been paid and that he should have paid Green and other suppliers. This Court stated that under no circumstances should the Tribe or its individual members be forced to pay twice. It was also stated that the purported guaranty agreement fell within § 81 (now § 2103), although the conclusion seems unnecessary in deciding the controversy. Perhaps the Court's conclusion was based upon the fact that the suppliers were to be paid with the proceeds of the tribal logging operation.

The Tenth Circuit's opinion is not in conflict with *Green*. Green claimed he was entitled to be paid with the sales proceeds of timber taken from tribal property — the "proceeds" of trust property. That situation does not exist in the instant case -- taxpayer money was appropriated to

the Tribe and was properly spent. The grant funds could not have been used for any other purpose.

The Tribe also asserts that the Tenth Circuit's opinion conflicts with *Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 15, 47 S.Ct. 361, 71 L.Ed. 658 (1927). That case concerned the authority of legal counsel under certain deeds and a power of attorney to maintain litigation over real property. The court held that the conveyance and power of attorney, which had been granted by an Indian "Captain" of the Pueblo, was void because the Indian Council had not authorized it, and because § 81 approval had not been obtained. The case clearly involved an ordinary agent or attorney "service" contract "relative to [Indian] lands", not a situation similar to the case at bar.

Green was decided in 1914 and *Santa Rosa* in 1927, yet the lower courts have had little or no difficulty in fairly resolving § 81 litigation. Certiorari should be denied.

CONCLUSION

Petitioners have not demonstrated a sufficient reason for the granting of certiorari. The opinions of the Circuit Courts are not conflicting. Title 25 U.S.C. § 81 was not intended to encompass construction contracts entered into by Tribes, particularly where they are to be funded with government grant money disbursed under the supervision of the granting governmental agency.

The Tenth Circuit's opinion is narrow in its application and is not likely to mislead lower courts in future litigation. Section 81 of Title 25 was intended to protect Indians

and tribes from unscrupulous attorneys and claim agents, not to inhibit the construction of improvements on tribal property with government grant money. Section 81 was intended to serve as a shield, not as a sword. The Tenth Circuit's conclusion does not violate the accepted rules of construction applicable to Indian statutes.

Finally, the opinion of the Tenth Circuit does not depart from the teaching of prior decisions of this Court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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September, 1985

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AFFIDAVIT OF SERVICE AND MAILING

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKLAHOMA)

John B. Hayes, being first duly sworn deposes and says:

1. That he is an active member of the Bar of this Court, and that he is an attorney for two Respondents, Apex Construction Company, Inc. and Oklahoma Surety Company.

2. That the Opposing Brief of Respondents, Apex Construction Company, Inc. and Oklahoma Surety Company, to Petitioners Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to which this ceritficate is attached has been served upon all counsel of record for the parties in this cause in accordance with the provisions of Rule 28 of the Rules of the Supreme oCurt of the United States by placing three copies of the same in the United States mail, first class postage prepaid, properly addressed to:

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& F. Browning Pipestem
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Attorneys for Respondent Briesch Engineering Company, Inc.

3. That the foregoing represents service on parties required to be served under the provisions of Rule 28 of this Court.

4. That to my own personal knowledge and pursuant to Rule 28.2 of the Rules of this Court, 40 copies of this Opposing Brief of Respondents, Apex Construction Company, Inc. and Oklahoma Surety Company, to Petitioners Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed, first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States on the 3rd day of Sept., 1985, which is within the time alowed for filing under the Rules of this Court.

John B. Hayes

Subscribed and sworn to before me on the 3rd day of Sept., 1985.

Mary Ann Ross
Notary Public

My Commission Expires:
5-1-88

(SEAL)

Supreme Court, U.S.
FILED
SEP 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-229

In The

Supreme Court of the United States

October Term, 1985

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, ex rel., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma,

Petitioner,

v.

APEX CONSTRUCTION COMPANY, INC., a corporation; BREISCH ENGINEERING COMPANY, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, BREISCH ENGINEERING COMPANY, INC., TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

Petitioners' presentation of the questions for review are satisfactory to this Respondent.

PARTIES TO THE ACTION

The names of all parties and their designations are properly referred to in the caption of the case in the Court, with the exception that Respondent BREISCH ENGINEERING COMPANY, INC. is incorrectly referred to as BRIESCH ENGINEERING COMPANY, INC.

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No. 85-229

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, ex rel., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma,

Petitioner,

v.

APEX CONSTRUCTION COMPANY, INC., a corporation; BREISCH ENGINEERING COMPANY, INC., a corporation; and OKLAHOMA SURETY COMPANY, a corporation,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT, BREISCH ENGINEERING COMPANY, INC., TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent BREISCH ENGINEERING COMPANY, INC. ("BREISCH") hereby submits the following Brief in Opposition to the Petition for a Writ of Certiorari filed by

Petitioners THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA; and THE UNITED STATES OF AMERICA, ex rel., G. WILLIAM RICE on behalf of the Sac and Fox Tribe of Indians of Oklahoma (collectively "the TRIBE").

STATEMENT OF THE CASE

BREISCH hereby adopts the Statement of the Case contained in the Opposing Brief of Respondents APEX CONSTRUCTION COMPANY, INC. and OKLAHOMA SURETY COMPANY ("APEX" and "OKLAHOMA SURETY", respectively) to Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

REASONS FOR NOT GRANTING THE WRIT

BREISCH hereby adopts APEX's and OKLAHOMA SURETY's preliminary discussion of 25 U.S.C. §81 and its history and in further support of the inescapable conclusion that §81 was enacted to regulate only those contracts between a tribe or individual Indians and attorneys or claim agents for services in establishing claims on behalf of the tribe or individual Indians against the United States under

federal laws or treaties, BREISCH would direct the Court's attention to 25 U.S.C. §81a adopted June 26, 1936, which specifically refers to "contracts. . . between the authorities of any tribe, band, or group of Indians and their attorneys for the prosecution of claims against the United States. . . " and §81b referring to "any. . . contract. . . by any tribe, band, or group of Indians with an attorney or attorneys for the rendition of services in the prosecution of claims against the United States. . . ". Clearly it was the intent of Congress in enacting §§81A and 81b to limit the scope of §81 to those contracts between tribes and their attorneys for prosecution of claims against the United States and not to have §81 apply to any and all contracts with an Indian tribe no matter how nebulously "related" to Indian lands.

A. THE CIRCUIT COURTS ARE NOT IN CONFLICT.

The TRIBE asserts that their Petition for a Writ of Certiorari should be granted because of an apparent conflict between the decision of the Tenth Circuit herein, The Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction

Company, Inc., 757 F.2d 1221 (10th Cir., 1985) and decisions of the Seventh, Wisconsin Winnebago Business Committee v. Koberstein, 762 F.2d 613 (7th Cir., 1985) and Ninth Circuits, United States v. Southern Pacific Transportation Company, 543 F.2d 676 (9th Cir., 1976). However, a review of the facts and holdings in the latter two cases reveals no conflict among the circuit courts on the applicability of §81 to construction contracts.

The TRIBE paints the holdings of the Seventh and Ninth Circuit Courts with the same broad brush in concluding that the Wisconsin Winnebago Business Committee v. Koberstein, supra., and the United States v. Southern Pacific Transportation Company, supra. cases dealt with the application of 25 U.S.C. §81 "to contracts for the construction of improvements upon Indian Tribal lands." Even the most cursory review of those decisions unequivocally reveals that neither case dealt with nor turned upon contracts for construction of improvements on tribal lands.

The Seventh Circuit in the Wisconsin Winnebago case found that:

> "Because the Agreement gives Ho-Chunk the absolute right to control the operation of the bingo facility located on tribal trust lands and prohibits the exercise of the Business Committee's right to encumber tribal trust property, we hold that the Bingo Management Agreement is an 'agreement. . . relative to [Indian] land,' as that term is used in 25 U.S.C. §81. Cf. Contracts for the Employment of Managers of Indian Tribal Enterprises, 61 Op. Solicitor, Dept. of Interior, No. M-36119 (Feb. 14, 1952) (contract to operate a tribal farming enterprise, including the cultivation of tribal lands, the development of livestock industries to utilize the crops raised by the enterprise, and the marketing of surplus crops is relative to Indian lands as that term is used in §81)." Wisconsin Winnebago Business Committee v. Koberstein, supra. at 619.

Obviously, the decision in Wisconsin Winnebago turned not upon the construction contract, but rather upon the agreement granting to a third party absolute control over the operation of tribal trust property and prohibiting the tribe's right to encumber same; a totally different situation from the construction and engineering contract upon which the TRIBE sued herein.

Nor does the decision of the Ninth Circuit in United States v. Southern Pacific Transportation Company, supra., involve a contract for the construction of improvements upon tribal lands. Rather Southern Pacific was a trespass

suit against the railroad for operating its railway across the reservation of the Walker River Paiute Tribe of Nevada without having first obtained a valid right-of-way from the tribe under the terms of 25 U.S.C. §177 which provides in pertinent part:

> "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The Ninth Circuit Court only mentioned 25 U.S.C. §81 in passing, holding that "(a) license may not be inferred as an implied-in-fact contract because of the failure of Southern Pacific to comply with 25 U.S.C. §§81 and 84, which govern contracts with Indian tribes." An implied-in-fact license to operate a railway across tribal lands is quite similar to the management agreement in Wisconsin Winnebago; both agreements would prevent the tribe from exercising its own control and discretion over tribal property, which situation does not exist under the engineering and construction contracts sued upon herein.

Further, the TRIBE has wholly neglected to apprise this Court of the Ninth Circuit's decision in Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708 (9th Cir., 1980) which is factually the most analogous case to the instant cause.

In Gila River, an action was brought by an Indian tribe against an architectural firm and a building contractor for damages for negligent design and construction of a youth center on reservation lands. The district court dismissed for lack of jurisdiction and the Ninth Circuit affirmed, holding that 28 U.S.C. §1362, which provides for district court jurisdiction over suits brought by Indian tribes wherein the matter in controversy arises under the Constitution, laws or treaties of the United States, only extends to actions involving the possessory rights of tribes to tribal lands. Id. at 714. With regard to jurisdiction under 28 U.S.C. §1331, the Ninth Circuit stated:

> "We can discern no reason in the present case to extend the reach of the federal common law to cover all contracts entered into by Indian tribes. Otherwise the federal courts might become a small claims court for all such disputes.
>
> . . .

> We see no reason why commercial agreements between tribes and private citizens cannot be adequately protected by well-developed state contract laws. Nor has the tribe pointed out why national uniformity of rules governing these transactions would be desirable. . (Citations omitted). Adoption of state law in such cases does not present a conflict with the federal policy or interest in protection of Indian tribes. Nor has any other court perceived the need for federal common law rules governing contract disputes between Indian tribes and non-Indians." Id. at 714-715.

Rather than being in conflict with the decision of the Tenth Circuit herein, the Ninth Circuit's decision in Gila River is on all fours with the appellate court's decision in this matter. Further, the decision herein is on all fours with the case of Brown v. United States, 486 F.2d 658 (8th Cir., 1973) which held that §81 governs only "the right to be compensated with tribal funds." Id. at 661.

In summary, there is absolutely no conflict among the circuit courts regarding the applicability of §81 to engineering and construction contracts. The Wisconsin Winnebago and Southern Pacific courts found that §81 applied in those particular cases because the contracts litigated therein affected the absolute right of the tribe to control and manage its tribal property. Gila River, which is

factually analogous to the instant situation, did not apply §81, and Brown is on point with the Tenth Circuit herein in limiting §81 applicability to those contracts involving compensation from tribal funds. The decision of the Tenth Circuit herein is unequivocally just and follows, rather than conflicts, with the rationales of the other circuit courts.

B. THE DECISION OF THE TENTH CIRCUIT DOES NOT DEPART FROM ESTABLISHED STATUTORY CONSTRUCTION.

Like APEX and OKLAHOMA SURETY, BREISCH does not disagree with the TRIBE's general statement of the rules of construction of Indian statutes. However, BREISCH strongly disagrees with the TRIBE's contention that the district court and the Tenth Circuit "eviscerated" the plain language of the statute and resolved all possible ambiguities against the TRIBE in contravention of established canons of Indian law construction.

As clearly pointed out by the trial court below, the legislative history behind 25 U.S.C. §81 reveals that it was intended to prevent the "godless robbery of those defenseless people" by attorneys and claim-agents. The

statute was clearly not intended to allow a tribe to enter into commercial construction contracts utilizing federal grant funds and then declare the contract invalid and retain both the grant funds and the improvements made therewith. To apply the Tribe's construction of §81 to the instant case would simply and undeniably allow the TRIBE to commit a "godless robbery" of the Respondents herein. Even the most liberal construction of Indian laws in favor of the Indians cannot extend to such obvious unjust enrichment of the TRIBE to the detriment of third parties who have contracted with the TRIBE in good faith.

The TRIBE's construction of 25 U.S.C. §81 goes far beyond the bounds of liberal construction in favor of the Indians and would result in the unjust enrichment of the TRIBE to the detriment of both the United States which made the grant and of the Respondents who performed the contract.

C. **THE TENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.**

Lastly, in petitioning this honorable Court for a writ of certiorari, the TRIBE contends that the Tenth Circuit's decision is in direct conflict with this Court's decisions in Green v. Menominee Tribe of Indians in Wisconsin, 233 U.S. 558, 34 S.Ct. 706, 58 L.Ed. 1093 (1914) and Pueblo of Santa Rosa v. Fall, 273 U.S. 316, 47 S.Ct. 361, 71 L.Ed. 658 (1927).

APEX and OKLAHOMA SURETY have adequately addressed the factual content of Green and BREISCH will not burden the Court with a repetition thereof. However, BREISCH would call the Court's attention to two facets of the opinion in Green which clearly show why §81 was found to be applicable.

The Court therein stated:

> "But if it be conceded for argument's sake that there is ambiguity involved in determining from the text whether the statute is inapplicable, we are of the opinion that the case as made is so within the spirit of the statute, and so exemplifies the wrong which it was intended to prevent and the evils which it was intended to remedy as to dispel any doubt otherwise engendered. Nothing, we think, could more

> cogently demonstrate this statement than does the development in the court below concerning the claim in controversy: the uncertainty as to the alleged debtor, manifested by the claim against the individual members of the tribe as principals and against the tribe as a mere surety, shifting, as the exigencies of the case required, to a claim against the tribe as principal, and secondarily against the members are mere accessories, culminating in a prayer for relief which, in and of itself, points to the uncertainty with which the transactions referred to were environed." Id. at 569-570.

Thus, the Court in Green found that §81 should act as a shield for the tribe and its individual members because of the uncertainties in the transaction.

Secondly, the Court found that the case "as made involves deciding whether the petitioner (Indian trader) should bear the loss of the failure of the agent to pay over to him out of the moneys retained for that purpose, the sum of the advance of supplies; that is to say, whether the Indians, after having placed in the hands of the designated person the sum of the supplies, are under the obligation to pay again, - that is, to pay twice." Id. at 571.

It is patently clear that the Court in Green found §81 to be applicable in order to protect the Indians from paying twice for the supplies. The Indians were not unjustly

enriched because they had already tendered payment to the designated party. Therefore, the issue was whether the risk of loss should fall upon the Indians or the supplier.

This risk-balancing situation simply does not exist in the instant case, nor does the evil of uncertainty as to the alleged debtor, and other terms of the agreement, and Green is simply inapplicable.

The decision in Pueblo of Santa Rosa, supra., is also wholly inapplicable to the present case as it dealt with precisely the type of contract sought to be prevented by §81; i.e. a conveyance of property to a party in consideration of establishing the Indian's claim thereto with the government. The Court therein simply held that the attorney who brought the action seeking to enjoin the Secretary of the Interior from offering, listing or disposing of certain lands in Arizona as federal public land was not authorized to bring the suit on behalf of the pueblo because the attorney's contract violated §81.

The Court held:

> "The rights of Indians, unlettered and under national wardship, are here involved, and a deed purporting to convey their half interest in an

> enormous tract of country, without consideration aside from some indefinite and doubtful promise to establish their claim against the government, is upon its face so improvident as to call for affirmative proof of authority of the clearest kind." Id. at 320.

The contracts in Green and Pueblo of Santa Rosa involved the precise evils which §81 was designed to prevent. Their facts are totally inapplicable to the instant case and thus, the decision of the Tenth Circuit is not in conflict therewith.

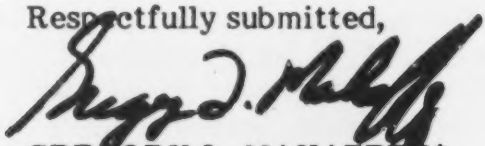
CONCLUSION

The TRIBE has presented no compelling reason why certiorari should be granted. 25 U.S.C. §81 was not enacted to allow Indian tribes to be unjustly enriched at great cost to the United States and to third parties. There is no conflict among the circuit courts in construing §81, the Tenth Circuit followed established rules of construction in determining this case, and the Tenth Circuit followed the rationale of Green and Pueblo of Santa Rosa in finding §81 inapplicable herein.

The Tenth Circuit's decision herein is just and well-considered and, contrary to the TRIBE's contention, will foster rather than negatively effect the ability of Indian tribes to increase their self-sufficiency and economic development by entering into valid engineering and construction contracts with third parties when such do not involve tribal funds.

The petition for writ of certiorari should be denied.

Respectfully submitted,



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September, 1985

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AFFIDAVIT OF SERVICE AND MAILING

STATE OF OKLAHOMA)
) SS
COUNTY OF OKLAHOMA)

Gregory L. Mahaffey, being first duly sworn deposes and says:

1. That he has applied for admission to the Bar of this Court, and that he is an attorney for one Respondent, Breisch Engineering Company, Inc.

2. That the Brief in Opposition of Respondent Breisch Engineering Company, Inc. to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit to which this certificate is attached has been served upon all counsel of record for the parties in this cause in accordance with the provisions of Rule 28 of the Rules of the Supreme Court of the United States by placing three copies of the same in the United States Mail, first class postage prepaid, properly addressed to:

Messrs. G. William Rice
and F. Browning Pipestem
Pipestem & Rice
408 W. Main, Suite 100
Norman, OK 73069
Attorneys for Petitioners

Mr. John B. Hayes
P.O. Box 468
Oklahoma City, OK 73101
Attorney for Respondents,
Apex Construction Company, Inc. and
Oklahoma Surety Company

3. That the foregoing represents service on parties required to be served under the provisions of Rule 28 of this Court.

4. That to my own personal knowledge and pursuant to Rule 28.2 of the Rules of this Court, 40 copies of this Brief in Opposition of Respondent Breisch Engineering Company, Inc. to Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed, first class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States on the 6th day of September, 1985, which is within the time allowed for filing under the Rules of this Court.

GREGORY L. MAHAFFEY

Subscribed and sworn to before me on the 6th day of September, 1985.

NOTARY PUBLIC

My Commission Expires:

NOTARY PUBLIC IN AND FOR STATE OF OKLAHOMA (SEAL)

GERRY L. HALL
NOTARY PUBLIC, OKLAHOMA COUNTY
My Commission Expires March 28, 19